Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

ANTONINO SERAFINO,

Petitioner,

v.

ALBERTO GONZALES, Attorney General of the United States; SECRETARY OF DEPARTMENT OF HOMELAND SECURITY; BUREAU OF IMMIGRATION & CUSTOMS ENFORCEMENT; GREG KENDRICK, Newark Field Office Director, United States Immigration & Customs Enforcement,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When an administrative agency fails to apply the controlling legal standard in resolving an issue, should a reviewing court, consistent with *INS v. Ventura*, 537 U.S. 12 (2002) and *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), decide the issue *de novo* or remand the matter to the agency to apply the controlling legal standard?

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OPINIONS BELOW

The decision of the Court of Appeals is not officially reported but is unofficially reported at 2006 U.S. App. LEXIS 16373 (3d Cir. 2006), and appears in Appendix A to this Petition at App. 1-7. The decisions by the Board of Immigration Appeals ("BIA" or the "Board") are not officially reported and appear in Appendix A to this Petition at App. 8-9.

JURISDICTION

The judgment entry date is October 4, 2006. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. §1182(a)(2)(A)(I)(ii)

Except as provided in clause (ii), any alien convicted of . . . a crime involving moral turpitude is inadmissible.

26 U.S.C. §7201

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof shall be fined not more than $100,000 ($500,000) in the case of a corporation) or imprisoned not more than 5 years, or both, together with the costs of prosecution.

PRELIMINARY STATEMENT

This decision below presents a significant deviation from settled principles of administrative law most recently expressed by this Court in *Ventura*. Under the controlling categorical approach, applied in all federal circuits, the BIA determines whether an offense constitutes a crime involving moral turpitude ("CIMT") under Section 212(a)(2)(A)(I)(ii) of the Immigration & Nationality Act of 1952 as amended (the "Act"), 8 U.S.C. §1182(a)(2)(A)(I)(ii) solely by reference to the minimum necessary legal elements for conviction rather than what may have been the facts of the crime. Here, however, the Board departed from this governing rule and made the CIMT determination based upon the facts of the offense. Rather than remand this issue to the BIA for an administrative decision under the controlling categorical approach, the Court of Appeals addressed the issue *de novo*. Yet *Chenery* and its progeny make clear that an administrative agency decision can only be supported based upon reasoning actually adopted by the agency and *Ventura* forcefully reminds reviewing courts that issues should not be addressed *de novo* but rather remanded to the agency for consideration. Accordingly, the decision below squarely conflicts with decisions of this Court and should be reversed on certiorari. *See, e.g., Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 926 (1982) (certiorari granted where opinion below "appears to be inconsistent with prior decisions of this Court.").

STATEMENT OF THE CASE

The basic facts in this case show a lawful permanent resident with substantial ties to this country whose sole criminal record consists of a white collar tax offense.

A. Removal Proceedings And BIA Decisions

In the only criminal offense in his entire life, Mr. Serafino entered a plea of guilty on October 22, 1996 to a one count information in the United States District Court for the Southern District of New York charging him with a violation of 26 U.S.C. §7201. (App. 2). On January 28, 1997, he was sentenced to four months imprisonment to be followed by two years supervised release including four months home confinement. (App. 2). In removal proceedings after his release the Immigration & Naturalization Service ("INS" or the "Service")[1] charged him as removable for conviction of an aggravated felony under 8 U.S.C. §101(a)(43)(M)(ii) (conviction under 26 U.S.C. §7201 where revenue loss exceeds $10,000).

While contesting this charge, Mr. Serafino alternatively sought relief from removal under 8 U.S.C. §1255. Thus permanent residents such as Mr. Serafino can, reapply for permanent resident status in removal proceedings based upon their status as immediate relatives of United States citizens.[2] In making such an application, an alien like Mr. Serafino is assimilated to an applicant for admission and must demonstrate that either the bars to admissibility in 8 U.S.C. §1182(a), including conviction of a

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[1] During the pendency of this case, INS was abolished and the functions of that agency transferred to the Department of Homeland Security ("DHS"); to avoid confusion, however, references in this petition will be to the Service or INS. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002).

[2] Mr. Serafino fell into the immediate relative category under Section 201 of the Act, 8 U.S.C. §1151, as the father of an adult United States citizen daughter. *See* C. Gordon, S. Mailman, S. Yale-Loehr, *Immigration Law and Procedure* §§51.01, 71.05[1][e][v].

CIMT, do not apply in his case or that he is eligible for a waiver if such a bar does apply. *See, e.g.,* C. Gordon, S. Mailman, S. Yale-Loehr, *Immigration Law and Procedure* §§51.01, 71.05[1][e][v] (adjustment may be sought in removal proceedings, but adjustment applicants must clear any bar to admissibility in 8 U.S.C. §1182(a)). Moreover, the Third Circuit has expressly recognized this form of relief. *See, e.g., DeLeon-Reynoso v. Ashcroft*, 293 F.3d 633, 637 (3d Cir. 2002) (otherwise deportable permanent resident may seek relief through adjustment of status based upon qualifying relative). In this case, Mr. Serafino urged, *inter alia*, that he had not been convicted of a CIMT.

After losing on these issues before the Immigration Court, Mr. Serafino appealed to BIA, and on April 17, 2003, the Board handed down a one page decision dismissing Mr. Serafino's appeal. (App. 8-9). On the CIMT issue, the decision concluded, "The record reflects that the [petitioner's] conviction is based on his filing of fraudulent tax returns, and we find that it is a [CIMT]." (App. 8).

B. Proceedings Before The Court Of Appeals

Given the uncertain state of the law on the scope and manner of judicial review at the time of the April 17, 2003 BIA decision, Mr. Serafino filed a petition for review with the Third Circuit on the issue of removability. *See, e.g., Patel v. Ashcroft,* 294 F.3d 465, 468 (3d Cir. 2002). On February 23, 2004, a Third Circuit motions panel issued a non-precedential order granting the government's motion to dismiss on jurisdictional grounds, holding that the court lacked jurisdiction over a petition for review where the alien was convicted of an aggravated felony and because

petitioner's conviction under 26 U.S.C. §7201 constituted an aggravated felony under the Act. *Serafino v. Attorney General*, C/A Dkt. 03-2461 (February 24, 2004).

Following clarification from the Third Circuit that habeas corpus was available to aliens released on bond but not physically imprisoned, Mr. Serafino filed a petition for habeas corpus in the United States District Court for the District of New Jersey on May 9, 2005 challenging his removal order. *See Wang v. Cicci*, C/A Dkt. No. 04-2851 (3d Cir., April 26, 2005) (non-precedential) (on appeal from United States District Court for the District of New Jersey Third Circuit rejects holding by District Court that habeas corpus requires actual imprisonment of alien). After passage of the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005) ("REAL ID Act"), this petition was then transferred to the Third Circuit.[3]

On June 29, 2006, the Court of Appeals handed down a decision rejecting Mr. Serafino's claim. (App. 1-7). Rather than consider the reasons adopted by the BIA for finding Mr. Serafino's offense a CIMT, the opinion addressed this issue *de novo*, holding that the element of "willfulness" under 26 U.S.C. §7201 automatically rendered the conviction a CIMT, reasoning not adopted by the Board. (App. 6-7). A timely petition for rehearing with a

[3] In addition, Mr. Serafino petitioned the Court of Appeals to review the BIA's denial of his motion to reopen for relief under Section 212(c) of the Act pursuant to regulations promulgated to implement this Court's decision in *INS v. St. Cyr*, 533 U.S. 201 (2001), an issue on which certiorari is not sought.

suggestion for rehearing *en banc* was denied on October 4, 2006. (App. 12).

REASONS FOR GRANTING THE WRIT

In affirming the BIA's CIMT determination the decision below overlooked the settled rule dating back to this Court's seminal decision in *Chenery*, 318 U.S. 80 (1943) that an administrative agency decision can only be sustained based upon reasoning actually adopted by the agency. Similarly, the decision below failed to follow *Ventura* in not remanding the case to the BIA to address the CIMT issue under the correct legal standard. Given this clear conflict with decisions of this Court, certiorari should be granted.

Thus the Board determined that Mr. Serafino had been convicted of a CIMT not by reference to the legal elements of the statute involved but by reliance upon the facts of the offense, concluding in one sentence that, "The record reflects that the [petitioner's] conviction is based on his filing of fraudulent tax returns, and we find that it is a [CIMT]." (App. 12). This factual conclusion, however, violated the controlling categorical approach for CIMT determinations adopted in all federal circuits including the Third. *See Partyka v. Attorney General*, 417 F.3d 408 (3d Cir. 2005); *Knapik v. Ashcroft*, 384 F.3d 730 (3d Cir. 2004). Under this rule, as recently reiterated in *Alaka v. Attorney General*, 456 F.3d 88, 105 (3d Cir. 2006) for example, "This approach prohibits consideration of evidence other than the statutory definition of the offense, thus not taking into account the particular facts underlying conviction." Similarly, the categorical approach also represents the

controlling administrative rule. *See, e.g., Matter of Sanudo*, Int. Dec. 3537 (BIA Aug. 1, 2006) (under controlling categorical approach on CIMT determinations, " . . . we may not consider the actual conduct underlying conviction."). Moreover, this approach is embodied in such decisions by this Court as *Taylor v. United States*, 495 U.S. 575, 600 (1990).

Since the Board rested decision on the conduct allegedly involved in the offense and not the statutory definition of the crime, both *Chenery* and this Court's recent *Ventura* decision required the matter to be remanded to the Board to make a CIMT determination using the categorical approach. The Third Circuit decision, however, upheld the BIA based upon reasoning not adopted by the Board, concluding that the "willful" element for conviction under 26 U.S.C. §7201 satisfied the "corrupt mind" test for making an offense a CIMT. (App. 6-7). As if to underscore the sound logic of *Chenery* and *Ventura*, however, actual BIA precedent runs contrary to the reasoning adopted by the Court below in resolving the CIMT issue *de novo*. Thus *Matter of G,* 7 I & N Dec. 114 (BIA 1956) holds that a tax offense cannot constitute a crime involving moral turpitude where "intent to defraud is not an element of the substantive offense. . . ." and "The willful evasion of a tax, where no proof of specific intent to defraud *is required by statute*, does not, *per se*, involve moral turpitude. (emphasis supplied).

Similarly, *Matter of R,* 4 I & N Dec. 176 (BIA 1950) holds that a German tax statute prohibiting intentional tax evasion does not create a CIMT and even quotes with approval the following language from *United States v. Corrollo*, 30 F.Supp. 3 (D. Mo. 1939) commenting on the assertedly turpitudinous nature of the offense of tax

evasion: "The number of men who have at some time sought to evade the payment of a tax or some part of a tax to some taxing authority is legion. Any man who does that should be punished civilly or by criminal sentence, but to say that he is base or vile or depraved is to misuse words." Likewise in *Matter of Marchena*, 12 I & N Dec. 357 (BIA 1967), the Board refused to hold that a "willful" violation of 18 U.S.C. §1001 constituted a CIMT. Furthermore, very recently in *Sanudo*, the Board refused to hold that even the specific intent crime of domestic battery constituted a CIMT.

In short, with the BIA's plain error in not following the categorical approach by relying upon the alleged facts of the petitioner's offense and actual Board precedent rejecting "willful" as basis for a CIMT determination, this case presents a classic instance where a "judicial judgment cannot be made to do service for an administrative judgment," *Ventura*, 537 U.S. at 16 quoting from *Chenery*, 318 U.S. at 88. What has been recognized as the uncertain borderline of moral turpitude should have been first ascertained by the Board under the categorical approach and not by the reviewing court based upon reasoning not adopted by the agency. *See Demore v. Kim*, 538 U.S. 510, 576 (2003) (Breyer J., concurring in part and dissenting in part). Given the clear conflict between the path taken by the decision below and the path required by *Chenery* and *Ventura*, certiorari should be granted and the decision below reversed.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

January 3, 2007

Respectfully submitted,

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186 Fed.Appx. 302

ANTONIO SERAFINO, Petitioner v. ATTORNEY GENERAL OF THE UNITED STATES; SECRETARY OF DEPARTMENT OF HOMELAND SECURITY, BUREAU OF IMMIGRATION & CUSTOMS ENFORCEMENT; GREG KENDRICK, NEWARK FIELD OFFICE DIRECTOR, UNITED STATES IMMIGRATION & CUSTOMS ENFORCEMENT, Respondents

NO. 05-2720; No. 05-3577

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

2006 U.S. App. LEXIS 16373

June 29, 2006, Submitted Pursuant to Third Circuit LAR 34.1(A)
June 29, 2006, Filed

COUNSEL: For ANTONIO SERAFINO, Petitioner: Thomas B. Moseley, Newark, NJ.

For ATTY GEN USA, SECRETARY OF DEPARTMENT OF HOMELAND SECURITY, BUREAU OF IMMIGRATION & CUSTOMS ENFORCEMENT, GREG KENDRICK, NEWARK FIELD OFFICE DIRECTOR, UNITED STATES IMMIGRATION & CUSTOMS ENFORCEMENT, Respondents: James B. Clark, III, Anthony J. LaBruna, Jr., Office of United States Attorney, Newark, NY.

JUDGES: Before: BARRY, VAN ANTWERPEN and JOHN R. GIBSON*, Circuit Judges.

OPINION BY: Van Antwerpen

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* The Honorable John R. Gibson, United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

OPINION: OPINION OF THE COURT

Van Antwerpen, Circuit Judge:

Petitioner Antonio Serafino brings these consolidated appeals from two separate proceedings he initiated in the spring of 2005. The first, a habeas corpus petition for relief from an order of removal, was filed on May 9, 2005, and was shortly thereafter transferred to this Court for adjudication pursuant to the REAL ID Act. The second, a motion for relief pursuant to former section 212(c) of the Immigration and Nationality Act ("INA" or "Act"), was filed with the Board of Immigration Appeals ("BIA") on April 22, 2005. On July 11, 2005, the BIA denied that motion and Serafino appealed to this Court. This Court thereafter consolidated Serafino's appeal with his habeas petition. We have jurisdiction pursuant to 8 U.S.C. § 1252(a) and for the following reasons will affirm the BIA's decision and deny the habeas petition.

I.

We summarize the procedural history of this case only briefly, as the parties are familiar with it. Serafino was convicted on January 24, 1997, of tax evasion in violation of 26 U.S.C. § 7201. The former INS charged him with removability. Serafino received a hearing before an Immigration Judge, lost, and appealed to the BIA. On April 17, 2003, the BIA, in a Per Curiam opinion, found no merit to Serafino's contention that his conviction for tax evasion pursuant to 26 U.S.C. § 7201 constituted neither an aggravated felony offense as defined by the Act nor a crime involving moral turpitude. The BIA also rejected Serafino's claim for relief pursuant to § 212(c), as amended by the Antiterrorism and Effective Death Penalty Act of 1996

("AEDPA"), because the crime to which he had pleaded guilty was an aggravated felony. This Court subsequently dismissed Serafino's first petition for review on February 23, 2004, on the ground that this Court lacked jurisdiction over a petition for review filed by an alien who had committed an aggravated felony.

On April 22, 2005, Serafino moved to reopen his case for the purposes of again seeking § 212(c) relief. The BIA denied the motion on the grounds that § 212(c) "does not apply to an alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D) of the Act." The BIA cited § 440(d) of AEDPA as amended by § 306(d) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). As stated, Serafino subsequently filed a petition for habeas corpus relief on May 9, 2005. That petition and Serafino's appeal of his denied motion to reopen are now before this Court.

II.

We exercise plenary review of the BIA's legal decisions. *See Partyka v. AG of the United States*, 417 F.3d 408, 411 (3d Cir. 2005). As to whether a determination of the BIA "is entitled to *Chevron* deference, *Chevron, U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 81 L. Ed. 2d 694 . . . (1984). . . . [W]e owe no deference to [the BIA's] interpretation of" statutes it does not normally administer, such as the federal statutory scheme for taxation. *Id.*; *see also Knapik v. Ashcroft*, 384 F.3d 84, 88 (3d Cir. 2004) (explaining that we afford *Chevron* deference to the BIA's determination that a particular crime involves moral turpitude but we accord no deference to the BIA's determination of

"the elements . . . of a particular criminal statute deemed to implicate moral turpitude").

III.

Serafino first argues that his tax conviction does not constitute an aggravated felony within the meaning of 8 U.S.C. § 1101(a)(43)(M)(ii). As stated, this Court previously dismissed Serafino's first petition for review on February 24, 2004, on the ground that we lack jurisdiction over petitions for review filed by aliens who have committed aggravated felonies. *Serafino v. Attorney General,* 03-2461 (3d Cir. February 24, 2004) (holding Court lacked jurisdiction to consider Serafino's petition because his conviction under 26 U.S.C. § 7201 was a conviction for an aggravated felony and review was therefore statutorily precluded pursuant to 8 U.S.C. § 1252(a)(2)(C)). As a result, Serafino is collaterally estopped from again challenging whether his conviction is an aggravated felony. *See, e.g., Mosley v. Wilson,* 102 F.3d 85, 91 (3d Cir. 1996); *Patel v. Ashcroft,* 294 F.3d 465, 468 (3d Cir. 2002).

In turn, because of Serafino's commission of an aggravated felony, he does not qualify for § 212(c) relief as amended by the AEDPA. 8 U.S.C. § 1101(A)(43)(M)(ii) specifically includes among the list of aggravated felonies that render an alien deportable "an offense that . . . is described in section 7201 of Title 26 . . . in which the revenue loss to the Government exceeds $10,000[.]" The record establishes Serafino's conviction under this Title and a loss to the Government exceeding this amount, and therefore Serafino plainly committed an aggravated felony as that term is defined under the Act. Moreover, even though Serafino may be a lawful permanent resident, he

ignores the fact that 1996 amendments to 8 U.S.C. § 1182(h) render ineligible for relief those lawful permanent resident aliens who have committed aggravated felonies. *See, e.g., Lukowski v. INS,* 279 F.3d 644, 647-48 (8th Cir. 2002).

What remains is whether 26 U.S.C. § 7201 contains an element of willful fraud sufficient to render it a crime of moral turpitude. Here, the BIA concluded that because "[t]he record reflects that [Serafino's] conviction is based on his filing of fraudulent tax returns, . . . we find that it is a crime involving moral turpitude."

We have held that "[w]hether an alien's crime involves moral turpitude is determined by the criminal statute and the record of conviction, not the alien's conduct." *Partyka,* 417 F.3d at 411; *Knapik,* 384 F.3d at 88, 90-91; *De Leon-Reynoso v. Ashcroft,* 293 F.3d 633, 635 (3d Cir. 2002). We have referred to this as the "categorical" approach: "Under this categorical approach, we read the applicable statute to ascertain the least culpable conduct necessary to sustain a conviction under the statute." *Partyka,* 417 F.3d at 411 (citations omitted). As such, "[w]here a statute covers both turpitudinous and non-turpitudinous acts . . . it is 'divisible[ ]' and we then look to the record of conviction to determine whether the alien was convicted under that part of the statute defining a crime involving moral turpitude." *Id.*

Here, Serafino pleaded guilty to a one count information alleging a violation of 26 U.S.C. § 7201 (tax evasion), which provides: "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or payment thereof shall, in addition to other penalties provided by law, be guilty of a felony. . . ." 26 U.S.C. § 7201.

Review of the record indicates that, in pleading guilty to the one count information, Serafino acknowledged he "willfully and knowingly" attempted to evade taxes by filing "false and fraudulent" returns. Under a plain reading of the statutory language of 26 U.S.C. § 7201, Serafino's plea not only satisfies the statutory requirements for conviction under that federal tax statute, but it also constitutes the commission of a crime of moral turpitude, for the following reasons.

While "[t]he INA does not define 'moral turpitude,' and, as this Court has observed, the phrase 'defies a precise definition,'" *Partyka,* 417 F.3d at 413 (internal quotation omitted), the BIA defines "moral turpitude as conduct that is inherently base, vile, or depraved, contrary to the accepted rules of morality and the duties owed other persons, either individually or to society in general." *Id.* (quoting *Knapik,* 384 F.3d at 89) (additional citations omitted). "A longstanding test employed by the BIA to determine the existence of moral turpitude, which we find persuasive in a removal proceeding, asks whether the act is accompanied by a vicious motive or a corrupt mind." *Partyka,* 417 F.3d at 413 (internal quotations omitted). Here, given the statutory requirements of § 7201, we conclude that "willful" evasion inheres in the least culpable conduct of § 7201 and evidences a "corrupt mind." *Id.* Accordingly, § 7201 is not divisible, and, applied to the particular record of conviction in this case – which indicates Serafino pleaded guilty to "willfully and knowingly" attempting to evade taxes by filing "false and fraudulent" returns – we conclude the BIA did not err in concluding that Serafino's conviction constituted a crime of moral turpitude rendering him ineligible for deportation relief.

We have considered the remaining arguments advanced by the parties and have determined that no further discussion is necessary.

IV.

We will accordingly deny Serafino's petition for habeas corpus relief and affirm the decision of the BIA denying Serafino's motion to reopen his case.

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of Board of Immigration Appeals

File: A42 152 486 - Newark Date: Apr. 17, 2003

In re: ANTONINO SERAFINO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Thomas E. Moseley, Esquire

ON BEHALF OF SERVICE: Charles Parker, Jr.
District Counsel

ORDER:

PER CURIAM. The respondent has appealed from the Immigration Judge's decision dated January 28, 2000. We find no merit in the respondent's assertion that his conviction for tax evasion is neither an aggravated felony offense as defined in the Immigration and Nationality Act, nor a crime involving moral turpitude. The amendment to the Act which lowered the tax evasion threshold to $10,000 to qualify as an aggravated felony was effective on the date of enactment on September 30, 1996, and the respondent's subsequent plea of guilty to that offense on October 22, 1996, renders his offense an aggravated felony. The record reflects that the respondent's conviction is based on his filing of fraudulent tax returns, and we find that it is a crime involving moral turpitude. We are not persuaded by the respondent's assertion that he is eligible for relief under former section 212(c) of the Act pursuant to the determination of the United States Supreme Court that the restrictions on section 212(c) relief do not apply

retroactively to aliens who pled guilty to offenses prior to April 24, 1996. *See INS v. St. Cyr*, 121 S.Ct. 2271 (2000). The respondent plead guilty to tax evasion on October 22, 1996. He is not eligible for such relief under the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Pub. L. No. 104-132, 110 Stat. 1214. Therefore, the precedent decision in *INS v. St. Cyr*, *supra*, is not applicable in this case. Accordingly, the appeal is dismissed.

/s/ Edward R. Grant
FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of Board of Immigration Appeals

File: A42 152 486 - Newark Date: Jul. 11, 2005

In re: ANTONINO SERAFINO

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Thomas E. Moseley, Esquire

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] – Convicted of aggravated felony

APPLICATION: Reopening

This matter was last before the Board on April 17, 2003, at which time we dismissed the respondent's appeal. Now, pursuant to recently enacted regulations, the respondent has filed a special motion to reopen pursuant to 8 C.F.R. § 1003.44 to pursue relief under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (repealed 1996). The motion will be denied.

Having entered his guilty plea between April 24, 1996, and April 1, 1997, the respondent is eligible to apply for relief under section 212(c) of the Act "as amended by section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996." 8 C.F.R. § 1212.3(b)(2). As so amended, section 212(c) of the Act does "not apply to an alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C)

or (D)" of the Act. Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"), as amended by section 306(d) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546. In this case, the respondent's conviction rendered him deportable under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii), which is the successor statute to former section 241(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1231(a)(2)(A)(iii). Therefore, he is not eligible for section 212(c) relief and thus does not warrant special reopening. 8 C.F.R. § 1003.44(b)(4). We find the respondent's reliance on our decision in *Matter of Azurin*, 23 I&N Dec. 695 (BIA 2005), unavailing. Our decision in that case rested in part on the fact that the alien entered his plea prior to the enactment of AEDPA.

US Court of Appeals for the Third Circuit
Case Summary

Court of Appeals Docket #: 05-3577 Filed: 7/26/05
Nsuit: 0
Serafino v. Atty Gen USA
Appeal from: Immigration & Naturalization Service

Lower court information:
District: 0312-2 : A42-152-486
Date Filed: **/**/**

9/21/06	PETITION by Petitioner for rehearing en banc, filed. Certificate of service dated 9/5/06. (lml) [05-2720 05-3577]
10/4/06	ORDER (Scirica, Chief Judge, Sloviter, McKee, Rendell, Barry, Ambro, Fuentes, Smith, Fisher, Van Antwerpen, Authoring Judge, Chagares, and *Gibson, circuit Judges) denying petition for en banc rehearing by Petitioner Antonio Serafino, filed. *Honorable John R. Gibson, United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation, vote limited to panel rehearing only. (lml) [05-2720 05-3577]